47 US 72

FILED
JAN 27 1890
JAMES H. MCKENNEY
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1185.

FRANCIS ALEXANDRE ET AL., APPELLANTS,

vs.

JOHN MACHAN ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief to Oppose Motion to Strike Out.

R. D. BENEDICT,
Adv. for Appellants.

JUDD & DETWEILER, PRINTERS.

IN THE

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief to Oppose Motion to Strike Out.

First. This Court decided in the case of Stimpson *vs.* West Chester R. R. Co. (3 How., 553) that it had not the power to change the bill of exceptions; and see Keyser *vs.* Hitts (No. 42 of this term).

Second. This motion amounts to an application to this Court to resettle the bill of exceptions.

No such thing should be attempted by this Court. If there is any defect in it, the bill of exceptions should be sent back to the circuit judge, with directions to him to resettle it.

Third. The motion should be denied.

R. D. BENEDICT,
Adv. for Appellants.

New York Supreme Court.

JOHN MACHAN *et al.*, Libellants and Appellees,
vs.
THE STEAMSHIP CITY OF NEW YORK, &c., ALEXANDRE *et al.*, Claimants and Appellants.
No. 1185.

DISTICT OF COLUMBIA, *ss:*

Robert D. Benedict, being duly sworn, says he is advocate and counsel for the appellants herein, and was advocate and counsel in the court below, and had charge of the preparation and settlement of the bill of exceptions herein.

That a proposed bill of exceptions was made and served on the proctor of the libellants herein, and that such proctor proposed more than a hundred amendments thereto.

That the said bill of exceptions and amendments were thereafter presented to the circuit judge who tried the cause for settlement, and the libellants' proctor was fully heard in relation thereto, and memoranda in writing were submitted to the said circuit judge, who thereupon allowed certain of the amendments and disallowed others, and that thereafter the bill of exceptions herein was prepared in accordance with such allowance and disallowance, and was thereafter duly presented to the said judge for signature, and the same was duly signed and sealed by him, and forms part of the return in this cause, and all of the matter which appellees move to strike from the return is in said bill of exceptions.

And deponent further says that large portions of the testimony, depositions, and exhibits which the said proctor for libellants has moved to strike from the return were only made part of the bill of exceptions because the libellants' proctor insisted that they should be made part thereof.

And deponent further says that no motion was ever made in the circuit court to strike from the exceptions filed by the appellants in said court such of the said exceptions as are referred to in the notice of motion herein, and that all of said exceptions were allowed by the circuit judge and are contained in the bill of exceptions herein.

R. D. BENEDICT.

Sworn to before me this 27th January, 1890.

[SEAL] JAMES D. MAHER,
Notary Public.

Endorsed: Supreme Court U. S. 1889, October term. No. 1185. Francis Alexandre *et al.*, app'ts, *vs.* John Machan and *al.* Affidavit of R. D. Benedict. Filed January 27, 1890.

No 812

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

JOHN MACHAN and others, Owners, &c., of the British Bark "HELEN,"

Libellants-Appellees,

against

The American Steamship "CITY OF NEW YORK," &c., whereof FRANCIS ALEXANDRE and others, are Claimants,

Appellants.

Copy.

Motion to Remand Cause and the Record therein to U. S. Circuit Court, Southern District of New York, in order to apply for order amending exceptions of Appellants' filed herein *nunc pro tunc*, &c.

A. OLDRIN SALTER,
Proctor for Appellants and Motion.

ROBT. D. BENEDICT,
Of Counsel.

GEORGE A. BLACK,
Proctor for Libellants-Appellees.

U. S. SUPREME COURT.

OCTOBER TERM, 1890.

JOHN MACHAN, &c., LIBELLANTS-APPELLEES,

against

THE AMERICAN STEAMSHIP "CITY OF NEW YORK," &c., APPELLANTS.

INDEX.

	PAGE
Notice of Motion	2
Affidavit of A. O. Salter, Appellants' Proctor	3
Opinion of Wallace, J	5
Order of Judge Wallace, June 19, 1890	6
Order of Judge Wallace, July 16, 1890	7
Affidavit of R. D. Benedict, Appellants' Counsel	8
Exceptions	9–16

U. S. Supreme Court.

JOHN MACHAN and others, Owners, &c., of the British Bark "HELEN,"

Libellants-Appellees,

against

The American Steamship "CITY OF NEW YORK," her engines, tackle and apparel, whereof FRANCIS ALEXANDRE, JOHN E. ALEXANDRE, J. JOSEPH ALEXANDRE and J. HENRY ALEXANDRE are claimants,

Appellants.

And now before this Honorable Court comes A. Oldrin Salter, proctor for claimants and appellants, and moves this Court for an order remanding this cause and the record therein to the Circuit Court of the United States for the Southern District of New York, in order that the appellants may have an opportunity to apply to the said Circuit Court for an order amending the exceptions of the appellants filed herein, *nunc pro tunc*, so that they shall read in accordance with proposed amended exceptions forming part of these motion papers.

U. S. SUPREME COURT.

JOHN MACHAN and others, Owners, &c., of the British Bark "HELEN,"
Libellants-Appellees,

against

The American Steamship "CITY OF NEW YORK," her engines, tackle and apparel, whereof FRANCIS ALEXANDRE, JOHN E. ALEXANDRE, J. JOSEPH ALEXANDRE and J. HENRY ALEXANDRE are claimants,
Appellants.

Sir: Please take notice that on the pleadings and proceedings herein and the affidavits hereto annexed I shall present to this Court, at a Term thereof to be held in the Capitol in the City of Washington, D. C., on the 10th day of November, 1890, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, a motion, a copy of which is hereto attached, for an order remanding this cause and the record in this cause to the Circuit Court of the United States for the Southern District of New York, in order that the appellants may have an opportunity to apply to said Circuit Court for an order amending, *nunc pro tunc*, the exceptions filed in this cause in said Circuit Court on the 20th day of July, 1888, so that they shall read in accordance with the proposed amended exceptions hereto annexed, or for such other and further order or relief as to the Court may seem just.

Dated New York, October 23d, 1890.

Yours, &c.,

A. OLDRIN SALTER,
Proctor for Claimants-Appellants.

To GEORGE A. BLACK,, Esq.,
Proctor for Libellants-Appellees.

JOHN MACHAN and others, Owners, &c., of the British Bark "HELEN,"

Libellants-Appellees,

against

The American Steamship "CITY OF NEW YORK," her engines, tackle and apparel, whereof FRANCIS ALEXANDRE, JOHN E. ALEXANDRE, J. JOSEPH ALEXANDRE and J. HENRY ALEXANDRE are claimants,

Appellants.

Southern District of New York, ss.:

A. OLDRIN SALTER, being duly sworn, says: That he is the proctor for the claimants and appellants in this case; that the preparation of the exceptions and bill of exceptions in this case was not made by deponent, but deponent committed the preparation thereof to his counsel, Robert D. Benedict, and deponent has learned by the brief submitted on behalf of the libellants on the motion in this Court to strike out certain exceptions from the bill of exceptions, that it was claimed by said libellants' proctor that certain exceptions could not be considered by the Supreme Court on the appeal, because the grounds of the exceptions had not been stated; and deponent says that he was not aware that in the preparation of exceptions in admiralty any such stringent rule prevailed as that an exception could not be considered unless a ground upon which it was taken was stated. That if deponent had been aware that it was necessary to state such grounds he would not have allowed the exceptions to be put in without such statement of the grounds. Deponent further says that he has caused to be prepared amendments to said exceptions, setting forth the various grounds upon which the said exceptions were severally taken which are hereto annexed, and he desired that the said exceptions on file may be amended, *nunc pro tunc*, so as to contain the grounds so set forth. Deponent further says that he is afraid that unless said

10 exceptions are allowed to be so amended the claimants and appellants may be seriously prejudiced in their appeal.

Deponent further says that a motion was duly made in this cause before Mr. Justice Wallace in the Circuit Court of the United States for the Southern District of New York, in May, 1890, for an order reviving this suit in the name of the executors of Francis Alexandre, deceased, and making them parties and amending, *nunc pro tunc*, the exceptions filed in this cause on the 20th day of July, 1888, so that they would read in accordance with the proposed amended exceptions hereto annexed, or for such other and further order or relief as to the Court might seem just. That said motion was made by serving on the proctor for libellants and respondents a copy of the proposed
11 exceptions and of affidavits of the counsel for appellees which was in the same wording as the affidavit of said counsel on this motion, and also on an affidavit of the proctor of the said claimants and appellants which contained the same statements as are heretofore contained in this affidavit.

That said proctor for the libellants and respondents appeared on such motion and objected that said Circuit Court had no jurisdiction to entertain the same, and thereupon such proceedings were had upon such motion that the said Judge denied the same on the ground of lack of jurisdiction of said Circuit Court to entertain it.

That the libellant's counsel caused to be entered an order of said Court denying such motion, bearing date June 19, 1890, and which order on motion duly made was amended by the
12 entry of an order bearing date July 16, 1890. Copies of the opinion of said Justice and of said orders on said motion are hereto annexed, and that deponent intends if this cause and the record is remanded to the said Circuit Court, to renew the application to said Court for such amendment of said exceptions *nunc pro tunc*.

Subscribed and sworn to before me, this 23 day of October, 1890. A. Oldrin Salter

A. L. Jacobs
Notary Public
N.Y.Co.

Seal

MACHAN

vs.

THE CITY OF NEW YORK.

WALLACE, J.:

This is a motion by a party who has already perfected an appeal from a decree of this Court in an admiralty cause to the Supreme Court to amend the exceptions to the findings already filed and to order the substitution of an executor in the place of a party who has died pending the appeal.

Inasmuch as upon an appeal to the Supreme Court from the Circuit Court, the property, funds and securities in the cause are not transferred with the record to the Supreme Court, it would seem that the Circuit Court has power to make any necessary order for the preservation of the fund in its custody.

Goddard *vs.* Ordway, 95 U. S., 672.

But with this exception the Circuit Court cannot exercise any control over the cause after an appeal has been perfected, because from that time as in the case of appeals in equity and writs of error in suits at comman law, the suit is cognizable only by the Supreme Court.

Keyser *vs.* Farr, 105 U. S., 265; Draper *vs.* Davis, 102 U. S., 370.

The motion cannot be entertained.

(Filed June 5, 1890).

16 At a Stated Term of the Circuit Court of the United States for the Southern District of New York, held at the Court Rooms, in the Post Office building, in the City of New York, on the 19th day of June, 1890.

Present—Hon. WILLIAM J. WALLACE, Circuit Judge.

JOHN MACHAN *et al.*, Owners of the British Bark "HELEN," her tackle, &c.,
Libellants and Appellants,

17 *vs.*

The American Steamship "CITY OF NEW YORK," her engines, &c., FRANCIS ALEXANDRE, JOHN E. ALEXANDRE, J. JOSEPH ALEXANDRE and J. HENRY ALEXANDRE,
Claimants and Appellees.

The motion of the appellants for an order reviving this suit in the name of the executors of Francis Alexandre, deceased, and making them parties, and amending, *nunc pro tunc*, the exceptions filed in this cause on the 30th day of July, 1888, having
18 come on to be heard: now, on reading and filing the notice of motion and the affidavits of A. Oldrin Salter and Robert D. Benedict, verified the 5th day of May, 1890, and the proposed exceptions thereto annexed, and after hearing Robert D. Benedict, Esq., of counsel for appellants, in support of said motion, and George A. Black, Esq., counsel for libellants, appearing for the purpose of objecting to the jurisdiction of the Court, it is

ORDERED, that the said motion be and the same hereby is denied.

(Sd.) WM. J. WALLACE.

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, held at the Court Rooms in the Post Office building, in the City of New York, on the 16th day of July, 1890. 19

Present—Hon. WILLIAM J. WALLACE, Circuit Judge.

JOHN MACHAN *et al.*, Owners of the British Bark "HELEN," her tackle, &c.,
Libellants and Appellees,

against

The American Steamship "CITY OF NEW YORK," her engines, &c., FRANCIS ALEXANDRE, JOHN E. ALEXANDRE, J. JOSEPH ALEXANDRE and J. HENRY ALEXANDRE,
Claimants and Appellants. 20

An order having been entered on the 19th day of June, 1890, in this action, and a motion having been made for a re-settlement thereof,

Now, on hearing counsel,

IT IS ORDERED, that the said order of June 19th, 1890, be amended, *nunc pro tunc*, so as to read as follows: ORDERED, that said motion be and the same hereby is denied on the ground of lack of jurisdiction of this Court to entertain. 21

WM. J. WALLACE,

A copy. [L. S.]

JOHN A. SHIELDS,
Clerk.

22 U. S. SUPREME COURT.

JOHN MACHAN and others, Owners, etc., of the British Bark "HELEN,"
Libellants-Appellees,

against

The American Steamship "CITY OF NEW YORK," her engines, tackle and apparel, whereof FRANCIS ALEXANDRE, JOHN E. ALEXANDRE, J. JOSEPH ALEXANDRE and J. HENRY ALEXANDRE, are claimants,
Appellants.

23

Southern District of New York, ss. :

ROBERT D. BENEDICT, being duly sworn, says:

That he has been counsel in this case from the beginning, and that he as such counsel prepared the exceptions and the bill of exceptions and attended on the settlement thereof in this case, and deponent further says that he had overlooked or forgotten decisions that seem to hold that it is now necessary in admiralty cases that the ground on which an exception is taken, should be set forth in the exception itself. That deponent did not, while he was preparing said exceptions, think that such setting forth of the grounds was required in order to
24 have the exceptions considered on the appeal, and therefore failed to set forth such grounds.

Deponent further says that no suggestion was made by any one on the settlement of the bill of exceptions herein, that any of the exceptions were defective for this reason, and that it was not until deponent's attention was called to the matter by a brief of the libellants' proctor on a motion in the Supreme Court to strike out certain of such exceptions, that his attention was called to any claim by such proctor, that the exceptions were defective in this regard or that they might be so considered by the Appellate Court. That the motion to strike out such exceptions in the Supreme Court was made on behalf of the libellants, and that said motion was denied on the 3d day of February, 1890, but that deponent did not know of the entry of any order on the denial of such motion until on or

about March 28th, 1890. And deponent further says that he does not think that there can ever have been any doubt as to the grounds on which such exceptions were taken, and in deponent's opinion it would not be just that the appellants should be deprived of their right to have the questions in this cause fully presented to the Supreme Court, because of any oversight of deponent in the preparations of the exceptions. 25

Subscribed and sworn to before me this 23 day of October, 1890.

R. D. Benedict

Wm. D. Jones
Notary Public
for Kings Co.
Cert. filed N.Y. Co.

(Seal) 26

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN MACHAN *et al.*,
against
The Steamship "CITY OF NEW YORK." 27

EXCEPTIONS.

The claimants herein except to the findings, opinion and refusals to find of the Circuit Judge as follows:

First.—They except to that part of the third finding of fact which finds that the wind was blowing "from the southwest or the south-southwest, because it does not find the direction in which the wind was blowing, and because the direction of the wind was neither southwest nor south-southwest, but south.

Second.—They except to the part of the third finding of fact which finds that vessels could not discover one another at a distance of one-eighth of a mile, as without evidence to sustain it

28 *Third.*—They except to that part of the third finding of fact which finds that the course of the bark was "about N. E.," instead of about N. E. by N. ½, N., and to that part which finds that the steamship was going about eleven knots an hour, which was all the speed she could make against the wind, as contrary to the evidence.

Fourth.—If that part of the fifth finding of fact which says, "Those in charge of the steamer then discovered that the bark's course was eastward across the steamer's bow," is to be understood that the bark's previous course of N. E. or N. E. by N. ½, N. without a change of her course, was eastward across the steamer's bow, they except to the same as contrary to the evidence and to the third finding.

29 *Fifth.*—If that part of the fifth finding which says: "The steamer then sounded successive whistles of alarm and those in charge saw the bark luffing to the starboard," means that the successive whistles of alarm on the steamer were blown before those in charge of her saw the bark changing her course to her starboard, they except to the same, as contrary to the evidence and to the previous findings.

Sixth.—They except to the finding that when the steamer's engines were reversed she was within "probably not to exceed 150 feet" from the bark, as contrary to the evidence, and without support.

Seventh.—If by that part of the fifth finding of fact which
30 says that the bark "sank almost instantly," is meant that she sank in less than three minutes, they except to the same, as without evidence to support it.

Eighth.—They except to that part of the fifth finding of fact which says that "the whistle of the steamer first heard by those in charge of the bark indicated to them that the vessels were quite near to each other," as without evidence to support it.

Ninth.—They except to that part of the fifth finding of fact which says: "They thought the steamer was approaching bearing a beam on the bark's port side," as without evidence to support it.

Tenth.—They except to that part of the fifth finding of fact which says that the order to port the wheel of the bark was given

after seeing the green light of the steamer, as contrary to evidence. 31

Eleventh.—They except to that part of the fifth finding of fact which says that "the man at the wheel had hardly got the wheel over when the steamer struck the bark," if by that it is meant that there had not been time to change the course of the bark four or five points, as contrary to the pleadings and the evidence and other findings.

Twelfth.—They except to that part of the fifth finding of fact which says that "during the time the steamer was running under her hard-a-starboard wheel she changed her course to the eastward three or four points," as without evidence to support it. 32

Thirteenth.—They except to that part of the fifth finding of fact which says that "the bark after she luffed changed her course one or two points by the time the vessels came together," if by such finding is meant that she did not change more than two points, as contrary to the pleadings and the evidence and the findings, inasmuch as no question was ever made but it was conceded in the pleadings and on the trial in the District Court, and in the new pleadings in the Circuit Court, that the course of the bark at the collision was east half north, and the finding of this Court was that her course before she changed her course was about N. E.

Fourteenth.—They except to each of the conclusions contained in the first conclusion of law. 33

Fifteenth.—They except to the second conclusion of law.

Sixteenth.—They except te the third conclusion of law.

Seventeenth.—They except to that part of the opinion of the Circuit Judge which says: "The faults on the part of the steamer are so clearly established as to devolve upon the claimants the burden of showing that the bark was guilty of contributory fault." Also to the following: "It is entirely clear that the steamer disregarded both of the injunctions of the twenty-first sailing rule."

Also to the following part: "She did not slacken her speed when approaching another vessel so as to involve risk of collision and she did not go at a moderate speed in a fog."

Also to the following: "That she was approaching another

34 vessel so as to involve risk of collision from the time those in charge heard the first fog signal of the bark, is sufficiently manifest by their conduct in putting her wheel to starboard and hard-a-starboard instantaneously upon hearing the fog-horn."

Also to the following : "That she was not going at a moderate speed in a fog is conclusively established, by the fact that she was maintaining such speed that she could not effectually check herself by reversing her engines so as to avoid collision within the distance at which, in the condition of the fog, another vessel could be seen."

Also to the following : "The rule by which to determine whether a given rate of speed is moderate or excessive is that such speed only is moderate as will permit the steamer seasonably and effectually to avoid the collision by slackening speed
35 or by stopping and reversing within the distance at which an approaching vessel can be seen."

Also to the following : "Besides these infractions of the positive rules of navigation, the steamer was guilty of fault by her movement to port under a hard-a-starboard wheel with unabated speed, when she did not know the location or course of the bark."

Also to the following : "She could only conjecture the course of the bark and could not know whether the bark was approaching or was proceeding in the same direction with herself, or whether she was running free or beating to windward on the starboard tack."

Also to the following : "Under such circumstances she had
36 not right to act on conjecture. Her duty was to reduce her speed to the lowest rate compatible with her efficient control and proceed circumspectly until she could locate the bark and ascertain her course or until further signals indicated that the bark was beyond the range of risk."

Also to the following : "When such faults on the part of a steamship are shown, her owners are *prima facie* responsible for the collision, and must exonerate themselves by satisfactory proof that the sailing vessel was also guilty of misconduct which produced or contributed to the collision."

Also to the following : "The witnesses for the bark, while they differ in the details given, agree that the fog whistle of the steamer, when first heard by them, seemed to indicate by the direction of the sound that the steamer's bearing was abeam on the bark's port bow ; that very shortly after hearing her whistle they saw the steamer's masthead light and then her green

light so near as to render collision apparently inevitable and 37
that then the mate of the bark told the man at the wheel to port the bark's wheel and shouted to those who were below to save themselves."

Also to the following: "The violence of the blow given by the steamer to the bark shows that the steamer was under rapid headway when she struck the bark."

Also to the following: "The mate of the steamer is the only witness for the claimants, who states that the bark changed her course before the alarm was sounded."

Also to the following: "She could not have been half a minute under the helm hard-a-port."

Also to the following, "viz.: That the evidence of the diver, while alone it might not be enough to authorize the con- 38
clusion that the bark was headed N. N. E. at the time of the collision, "is entitled to consideration as measureably supporting that theory, and is more persuasive in fixing her heading approximately than are the conjectural opinions of the witnesses formed in the excitement and confusion of the moment, who think she was headed about east."

Also to the following: "If she was headed about N. N. E. when she was struck by the steamer, she did not change her course more than a point and a half under her port helm."

Also to the following: "It is not unreasonable to infer that the steamer, while running a minute under her hard-a-starboard helm, changed her course to the Eastward three or four points."

Also to the following: "And that in the short distance dur- 39
ing which she was under her hard-a-port helm with her engines reversed, she could not have been influenced materially to starboard."

Also to the following, viz.: That when the bark's change of course was made, the vessels were "within 200 or 300 feet of each other."

Also to the following: "That the bark's change of course was not a fault."

Also to the following: "The case is one for the application of the rule stated in the Carroll."

Eighteenth.—They except to the refusal to find that the wind was south, as contained in their first request, because the evidence warrants no other finding.

Nineteenth.—They except to the refusal to find their second request, because the evidence warrants no other finding.

40 *Twentieth.*—They except to the refusal to find that the speed of the steamer on that night after the fog set in, was ten knots, as requested in their fourth finding, because the evidence warrants no other finding.

Twenty-first.—They except to the refusal to find that the fog set in about forty minutes past ten o'clock, as requested in their fifth request, because the evidence warrants no other finding.

Twenty-second.—They except to the refusal to find as to the course and track of the bark in accordance with their eighth request, because the evidence warrants no other finding.

Twenty-Third.—They except to the refusal to find in accord-
41 ance with their ninth request, because the finding was in accordance with the pleadings and the evidence.

Twenty-fourth.—If it is not found that the horn of the bark was heard by those on the steamer about a point on the steamer's starboard bow, as requested in their tenth request, they except to the refusal so to find, because there was no evidence to the contrary.

Twenty-fifth.—They except to the refusal to find in accordance with their eleventh request, because the facts found required this finding.

Twenty-sixth.—They except to the refusal to find in accordance with their twelfth request so far as the same has not been
42 found, because there is no conflict of evidence as to the facts in said findings stated.

Twenty-seventh.—They except to the refusal to find the fourteenth request, because as to the movements of the steamer there was no conflict of evidence and as to the heading of the bark, that was conceded by the pleadings.

Twenty-eighth.—They except to the refusal to find the sixteenth request, because there is no conflict of evidence on this point.

Twenty-ninth.—They except to the refusal to find the seventeenth request, because there is no conflict of evidence on this point.

Thirtieth.—They except to the refusal to find the eighteenth request, because there is no conflict of evidence on this point.

Thirty-first.—They except to the refusal to find the nineteenth request, because there is no conflict of evidence on this point. 43

Thirty-second.—They except to the refusal to find the twentieth request, because there is no conflict of evidence on this point.

Thirty-third.—If the twenty-first request has not been found they except to the refusal to find the same because there is no conflict of evidence on this point.

Thirty-fourth.—They except to the refusal to find the twenty-second request, because there is no conflict of evidence on this point and the facts that are found require this finding.

Thirty-fifth.—They except to the refusal to find the twenty-seventh request. 44

Thirty-sixth.—They except to the refusal to find the twenty-eighth request, because there is no conflict of evidence, and the facts found require it.

Thirty-seventh.—They except to the refusal to find their first proposed conclusion of law.

Thirty-eighth.—They except to the refusal to find their second proposed conclusion of law.

Thirty-ninth.—They except to the refusal to find their third proposed conclusion of law.

Fortieth.—They except to the refusal to find their fourth proposed conclusion of law. 45

Forty-first.—They except to the refusal to find the fifth proposed conclusion of law.

Forty-second—They except to the refusal to find the sixth proposed conclusion of law.

Forty-third.—They except to the refusal to find the seventh proposed conclusion of law.

Forty-fourth.—They except to the refusal to find the eighth proposed conclusion of law.

Forty-fifth.—They except to the refusal to find the ninth proposed conclusion of law.

46 *Forty-sixth.*—They except to the refusal to find the tenth proposed conclusion of law.

Forty-seventh.—They except to the refusal to find the eleventh proposed conclusion of law.

Forty-eighth.—They except to the refusal to find the twelfth proposed conclusion of law.

Forty-ninth.—They except to the refusal to find the thirteenth proposed conclusion of law.

Fiftieth.—They except to the refusal to find the fourteenth proposed conclusion of law.

Fifty-first.—They except to the refusal to find the fifteenth
47 proposed conclusion of law.

Fifty-second.—They except to the refusal to find the sixteenth proposed conclusion of law.

A. O. SALTER,
Appellants' Proctor.

48

46 *Forty-sixth.*—They except to the refusal to find the tenth proposed conclusion of law.

Forty-seventh.—They except to the refusal to find the eleventh proposed conclusion of law.

Forty-eighth.—They except to the refusal to find the twelfth proposed conclusion of law.

Forty-ninth.—They except to the refusal to find the thirteenth proposed conclusion of law.

Fiftieth.—They except to the refusal to find the fourteenth proposed conclusion of law.

Fifty-first.—They except to the refusal to find the fifteenth
47 proposed conclusion of law.

Fifty-second.—They except to the refusal to find the sixteenth proposed conclusion of law.

A. O. SALLER,
Appellants' Proctor.

48

Office Supreme Court U. S.
FILED.
NOV 10 1890
JAMES H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

JOHN MACHAN ET AL.,
Appellees,

vs.

JOHN E. ALEXANDRE ET AL., EXECUTORS, &C.,
Appellants.

BRIEF IN OPPOSITION TO MOTION TO REMAND CAUSE.

GEO. A. BLACK,
Of Counsel for Appellees.

C. G. Burgoyne, 146-150 Centre Street, N. Y.

U. S. Supreme Court.

JOHN MACHAN ET AL.,
Libellants and Appellees,

vs.

JOHN E. ALEXANDRE ET AL., Executors, &c.,
Claimants and Appellants.

Brief for Appellees in opposition to Motion to Remand Cause.

Counsel for the appellants has not indicated in what respects the proposed exceptions, which he asks to file, differ from those on file, except by stating in his affidavit, that he has prepared amendments to said exceptions, setting forth the various grounds on which exceptions were severally taken, which are thereto annexed (fol. 9). An examination of the exceptions, and comparison of them with the proposed amendments show the following additions:

First. No change.

Second. As without evidence to support it.

Third. As contrary to the evidence.

Fourth. As contrary to the evidence and the third finding.

Fifth. As contrary to the evidence and the previous finding.

Sixth. As contrary to the evidence and without support.

Seventh. As without evidence to support it.

Eighth. As without evidence to support it.

Ninth. As without evidence to support it.

Tenth. As contrary to evidence.

Eleventh. As contrary to the pleadings and the evidence and the other findings.

Twelfth. As without evidence to support it.

Thirteenth. As contrary to the pleadings and the evidence and the findings, inasmuch as no question was ever made, but it was conceded in the pleadings and on the trial in the District Court, and in the new pleadings in the Circuit Court, that the course of the bark at the collision was E. ½ N., and the finding of this Court was that her course, before she changed her course, was about N. E.

Fourteenth, fifteenth, sixteenth and seventeenth. No change.

Eighteenth. Because the evidence warrants no other finding.

Nineteenth. Because the evidence warrants no other finding.

Twentieth. Because the evidence warrants no other finding.

Twenty-first. Because the evidence warrants no other finding.

Twenty-second. Because the evidence warrants no other finding.

Twenty-third. Because the finding was in accordance with the pleadings and the evidence.

Twenty-fourth. Because there was no evidence to the contrary.

Twenty-fifth. Because the facts found required this finding.

Twenty-sixth. Because there was no conflict of evidence as to the facts in said finding stated.

Twenty-seventh. Because as to the movements of

the steamer there was no conflict of evidence, and as to the heading of the bark that was conceded by the pleadings.

Twenty-eighth. Because there was no conflict of evidence on this point.

Twenty-ninth. Because there was no conflict of evidence on this point.

Thirtieth. Because there was no conflict of evidence on this point.

Thirty-first. Because there was no conflict of evidence on this point.

Thirty-second. Because there was no conflict of evidence on this point.

Thirty-third. Because there was no conflict of evidence on this point.

Thirty-fourth. Because there was no conflict of evidence on this point, and the facts that are found require this finding.

Thirty-fifth. No change.

Thirty-sixth. Because there was no conflict of evidence, and the facts found require it.

Thirty-seventh to fifty-second, both inclusive. No change.

The motion now made is a novel one. The affidavit of Mr. Salter is to the effect that the entire case was committed to the counsel, Mr. Benedict (Record, fol. 8), and Mr. Benedict's affidavit states that he has been counsel from the beginning, and prepared the bill of exceptions (fol. 23).

His excuse for the present application is that he had overlooked and forgotten the decisions that *seemed* to hold that it was now necessary in admiralty cases that the ground on which the exception is taken should be set forth in the exception itself (fol. 23), and on this ground he asks the Court to remand to the Circuit Court the record in this case, in order, as his motion shows, that he may apply to the said Circuit Court for an order amending the exceptions of the appellants,

filed herein in July, 1888 (fol. 3). It is strange that counsel should make such an affidavit, in view of the fact that he was of counsel in the case of the "Francis Wright" (105 U. S., 381), where this Court lays down the following as the law (387):

> "Every bill of exceptions must state and point "out distinctly the errors of which complaint is "made. It ought also to show the grounds relied "on to sustain the objection presented, **so that "it may appear the Court below was "properly informed as to the point to "be decided.** It is needless to say that this bill "of exceptions meets none of these requirements. "**From anything which is here pre-"sented no Judge would be presumed to "understand that the specific objection "made to any one of his findings was "that no evidence whatever had been "introduced to prove it; or to one of "his refusals, that the fact refused was "material, and had been conclusively "shown by uncontradicted testimony.** "No ground whatever is stated for any one of all "the exceptions which have been taken. To en-"title the appellants to be heard here upon any "such objections as they now make to the findings "**they should have stated to the Court "that they considered the facts refused "material to the determination of the "cause, and that such facts were con-"clusively proven by uncontradicted "evidence.** Under such circumstances it might "have been permissible to except to the refusal, "and present the exception by a bill of exceptions, "which would contain so much of the testimony "as was necessary to show that the fact as claimed "had been conclusively proven."

Claimants' counsel in his affidavit says that his attention was first called to what he now recognizes as a defect in his exceptions, by the motion of the proctor for the appellees to strike out certain of such exceptions as defective in this respect (fol. 24).

The language cited from the "Francis Wright" shows that an exception in the Circuit Court **is not a mere formality;** that upon it the action of the Circuit Judge, in the due administration of justice in the case, is to be predicated, and that **his attention** is to be called, by the exception, to the defects mentioned, **in order that thereupon he may either correct what is shown to be an error, or afford an opportunity to the parties to supply what is shown to be an omission.** In this respect the case is precisely analogous to the rules applied in jury trials. The exceptions must be made in time to have the correction applied if the Circuit Judge sees occasion; the exceptions in a common law case must be made before the jury leaves the bar.

In Walton vs. U. S. (9 Wheat, 651) the Court says:

> "It will be sufficient if the exception be taken
> "at the trial and noted by the Court with the
> "requisite certainty; and it may afterwards, *during*
> "*the term*, according to the rules of the Court, be
> "reduced to form and signed by the Judge. * * *
> "*But in all such cases* the bill of exceptions is
> "signed *nunc pro tunc*, and it purports to be the
> "same as if actually reduced to form and signed
> "pending the trial. And it would be a fatal error
> "if it were to appear otherwise; for the original
> "authority under which bills of exception are
> "allowed has always been considered to be re-
> "stricted to matters of exception taken pending
> "the trial and ascertained before the verdict."

The above case is cited with approval in R. R. Co.

vs. Heck (102 U. S., 120), and in the last case cited the Court refused to consider an objection made after the verdict, saying (120) :

> " A trial Court may, in the exercise of its " judicial discretion, grant a new trial if convinced " that its charge was wrong, **even though its " attention was not called to the error " complained of before the case was " finally submitted to the jury.** But not " so with us. Our power is confined to exceptions " actually taken *at the trial.* The theory of a bill " of exceptions is that it states what occurred while " the trial was going on."

The language used by Judge TANEY in Phelps vs. Mayer (15 How., 160) at page 161 is :

> " Nor is this a mere formal or technical pro- " vision. It was introduced and is adhered to for " purposes of justice. **For, if it is brought " to the attention of the Court that one " of the parties excepts to his opinion, " he has an opportunity of reconsider- " ing or explaining it more fully to the " jury. And, if the exception is to evi- " dence, the opposite party might be " able to remove it by further testimony " if apprised of it in time."**

And in that case an exception filed the day after the verdict was held too late.

See also U. S. vs. Cary, 110 U. S., 51.

Bearing in mind that the object of the exception is to draw the attention of the trial Judge to the point complained of, and that, according to the language of the " Francis Wright," such object is not obtained unless the ground of the exception is stated, where it is that no evidence has been introduced to prove one of

his findings, or that a fact has been conclusively shown by uncontradicted testimony, which he has refused to find, it becomes manifest that no amendment to the exceptions presented in this case can be permitted by the Circuit Judge, **for he has lost all jurisdiction to consider the case either as a matter of favor and discretion or as a matter of strict right. He can neither grant a rehearing or a new trial, and he cannot afford any opportunity to the appellants to supply proofs by which they could have overcome the objection presented.**

This view is supported by the case of "Annex No. 3," 38 Fed. Rep., 620, where Judge BLATCHFORD, in considering the case of Bronson vs. Schulten 104 U. S., 410, said (621):

> "In Bronson vs. Schulten the suit was one at
> "law, and it was there stated to be a well-estab-
> "lished rule 'that, after the term has ended, all
> "'final judgments and decrees of the Court pass be-
> "'yond its control, unless steps be taken during
> "'that term, by motion or otherwise, to set aside,
> "'modify, or correct them; and if errors exist they
> "'can only be corrected by such proceedings by
> "'writ of error or appeal as may be allowed in a
> "'Court which, by law, can review the decision.'
> "This rule is equally applicable to suits in admi-
> "ralty."

In Müller vs. Ehlers 91 U. S., 249, this Court says (251):

> "As early as Walton vs. United States, 9
> "Wheat., 651, the power to reduce exceptions taken
> "at the trial to form, and to have them signed
> "and filed was, under ordinary circumstances, con-

" fined to a time not later than the term at which
" the judgment was rendered. This, we think, is
" the true rule, and one to which there should be
" no exception, without an express order of the
" Court *during the term*, or consent of the parties,
" save under very extraordinary circumstances."

The affidavits filed in opposition to the motion show that many of the amendments proposed by the appellees to the bill of exceptions were disallowed, and that thereby evidence which the appellees regarded as of importance was excluded from the bill of exceptions, and that evidence was also omitted which would have been inserted but for the form in which the exceptions were framed.

If, more than two years after the preparation of the bill of exceptions and amendments, the Circuit Court is called upon to consider again all the details of this evidence, it is violating the rule requiring such matters to be disposed of while they are still fresh in the mind of the Court.

The affidavits also show that the appellants had notice that their bill of exceptions was attacked as to its form, and that the case of the "Francis Wright" was cited as one of those on which the attack was founded, and ordinary diligence would have required that counsel for the appellants should have presented his application immediately.

Lastly. The motion should be denied.

Respectfully submitted,
GEO. A. BLACK,
Counsel for Appellees,
71 Wall St., New York.

Lastly. The motion should be denied.

Respectfully submitted
Geo. A. Black,
Counsel for Appellees.
71 Wall St., New York.

Office Supreme Court U. S.
FILED,
NOV 10 1890
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

JOHN MACHAN ET AL.,

Appellees,

vs.

JOHN E. ALEXANDRE ET AL., EXECUTORS, &C.,

Appellants.

AFFIDAVIT IN OPPOSITION TO APPELLANTS' MOTION TO REMAND CAUSE.

GEO. A. BLACK,

Of Counsel for Appellees.

C. G. Burgoyne, 146-150 Centre Street, N. Y.

U. S. Supreme Court.

JOHN MACHAN ET AL.,
Libellants and Appellees,

AGAINST

JOHN E. ALEXANDRE ET AL., Executors, &c.,
Claimants and Appellants.

SOUTHERN DISTRICT OF NEW YORK, ss.:

GEORGE A. BLACK, being duly sworn, says that he is the proctor for the libellants in the above-entitled action, and that he has had charge of the same through all its stages.

That on the 25th of June, 1888, the opinion of the Circuit Judge on the appeal herein was filed in this case (35 Fed. Rep., 604).

That on the 19th of July, 1888, the claimants of the steamship "City of New York" served on deponent a copy of their "Exceptions" and proposed "Bill of Exceptions," and on the 2d of August deponent served his proposed amendments to said "Bill of Exceptions," numbered from 1 to 118, and the following is a copy of the first page and part of the second page of said proposed amendments:

> "Libellants object to the claimants' proposed "Bill of Exceptions herein, on the ground that it "is not in form or in substance a Bill of Excep-

"tions such as is permitted to be made up or "certified to the Supreme Court, under the Amend- "ment to Rule 8, Subdivision 6 of the Supreme "Court Rules promulgated May 2, 1880, and "published in 103 U. S., page XIII., and also "in the case of the 'Adriatic' (103 U. S., "730), and refers to the following cases: The "'Adriatic,' 103 U. S., 730; the 'Annie Lindsley,' "104 U. S., 187; the 'Benefactor,' 102 U. S., 214; "the 'Abbotsford,' 98 U. S., 440; Merchants' Ins. "Co. vs. Allen, 121 U. S., 72; the 'Francis "Wright,' 105 U. S., 381.

"Libellants also object to so much of the excep- "tions filed as purport to be exceptions to the "parts of the 'Opinion of the Circuit Judge,' and "which are numbered 17, on the ground that the "same is not the subject of any exception, and "will not be looked at by the appellate Court either "for the facts or law of the case, and refer to the "'Annie Lindsley'" (104 U. S., 187).

"Subject to the first of the foregoing exceptions, "and if the same is overuled, the libellants propose "the following amendments to said (so-called) Bill "of Exceptions."

Deponent further says that on September 19th, 1888, at the time of serving notice of the presentation of said Bill of Exceptions and amendments to the Circut Judge for settlement, he served a copy of the annexed brief (Exhibit A) with notice that the same would be submitted to the Circuit Judge.

That on the settlement of the said Bill of Exceptions, the following of libellant's proposed amendments containing additional evidence were disallowed: 73, 74, 75, 77, 78, 79, 81, 83, 84, 85, 86, 105, 106, 107, 108, 113, 114, 116, 117, 118, and the testimony of the witnesses Trask, Quick, Heyn, Van Clief and Dawson entirely struck out from said Bill of Exceptions, and

portions of the testimony of Wolf, Walker and Phillips also struck out, the same being regarded by the said Circuit Judge as immaterial.

Deponent further says that in the preparation of his amendments to the said proposed Bill of Exceptions, the manner in which the said Exceptions were framed was considered by him, and his amendments proposed *with reference thereto*, and that but for the form of said Exceptions all the evidence which had been given in said case would have been proposed as amendments by deponent, and he would have insisted upon the allowance of all the amendments made by him.

Deponent further says that in a memorandum served by claimants' counsel on the settlement of said Bill of Exceptions on September 22, 1888, he uses the following language:

> "The amendments proposed by libellants' counsel to our bill of exceptions are prefaced by a general objection to the whole bill. We understand that such an objection has no place in amendments to a bill of exceptions, but that it should be made by special motion to suppress the bill. When any such motion is made it will, we think, be easy for us to meet it. We claim that it is out of place in amendments proposed, and we therefore make no further reference to it, or to the copy authorities submitted, than to say that if the Circuit Judge shall think that we are in error on this point, we ask leave to be heard on the question.
>
> "SECOND. There is also prefaced an objection to the exceptions we have put on file, *and which are not before the Circuit Judge.* We understand that as to this objection also it is out of place here, and should be made by special motion. But if we are in error on this point, we ask leave to be heard."

Deponent further says that said Exceptions were on file and before said Circuit Judge, and doubtless considered by him, and that the said Bill of Exceptions was settled and signed by the Circuit Judge on October 27, 1888, and the return was made to this Court on the 31st of July, 1889.

Deponent further says that on the 17th of January 1890, he served a notice of motion in this Court to strike out from the return all testimony, depositions, diagrams and exhibits, on the ground that the said matter was improperly returned to this Court, and not permitted under sub division 6 of rule 8; and also that there be struck out from said return the exception numbered XVII., purporting to be an exception to the opinion of the Court; and also that there be struck out exceptions number 18 to 36, both inclusive, the same being exceptions to refusals to find matters of fact requested by claimants; and also to strike out exceptions numbered 37 to 53, both inclusive, the same being refusals to find claimants' proposed conclusions of law on the ground that the same were not matters of exception under the rules and practice of this Court, or of the Circuit Court.

That said motion was submitted on the 27th of January, 1890, without argument, at the suggestion of the Court, and on the 3d day of February, 1890, said motion was denied.

That in the brief for said motion, printed by deponent, he referred to and extracted from the case of the "Francis Wright" (105 U. S., 381), **which (as appears by the report) was argued in this Court by the counsel for the claimants herein.**

Deponent further says that on the 5th day of May, 1890, the appellants served the notice of motion mentioned in their affidavits, entitled in the United States Circuit Court, which motion was heard by the

Circuit Court and denied on June 5, 1890, and the order denying the same entered on June 17th.

Deponent further says that this cause was docketed at the October Term 1889, by the Number 1185.

GEO. A. BLACK.

Sworn to before me November 6th, 1890.

LAWRENCE KNEELAND,

[SEAL.] Notary Public,
Kings Co.
Cert. filed in N. Y. Co.

Exhibit A.

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN MACHAN ET AL.

AGAINST

THE STEAMSHIP "CITY OF NEW YORK."

Memorandum of authorities as to form of bill of exceptions on appeal to the Supreme Court from a decree in admiralty, and as to what should be contained therein.

In the case of the Abbottsford, 98 U. S., 440, the Court decided that under the Act of February 16th, 1875, the findings of fact by the Circuit Court in admiralty cases are conclusive, and that only rulings upon questions of law can be reviewed upon exceptions. This was reaffirmed in the case of the Benefactor, 102 U. S., 214, where the Court says, page 218: "In the Abbottsford we decided that on an appeal in this class of cases we could only pass on such rulings of the Court below as might *properly* be put into a bill of exceptions on the trial of an action at law, and that the findings of fact sent up with the record were conclusive here. If there are errors in these findings they can only be corrected at the proper time and in the proper way by the Court below. We are no longer required to weigh evidence. On an appeal, the findings have all the effect of the verdict of a jury in actions at law. This must be accepted as our final conclusion as to the effect of the Act of 1875 in this particular." * * *

"The bill of exceptions in this case contains all the evidence and requests of the appellant in the Court below to find the facts in a certain way."

The Supreme Court refused to consider the exceptions.

Under these decisions the question having arisen as to how much, if any, of the evidence should be inserted in the record upon appeal to the Supreme Court in these cases, the Supreme Court in the case of the "Adriatic" (103 U. S., 730), WAITE, C. J. says as follows: "As under our repeated decisions, the facts as found are conclusive on us, it is clear the testimony may not be necessary on the hearing of the appeal. For this reason it may with propriety by consent of counsel be omitted from the printed record. * * * The section of the Revised Statutes referred to, however, requires only copies of such of the proofs to be sent up "as may be necessary on the hearing of the appeal." This gives us power to prescribe by rule what shall be done in cases where the Act of 1875 applies. For the guidance hereafter of parties appealing, and the officers of the Courts below in such a case, we, therefore, now promulgate the following as an additional paragraph numbered 6 to rule 8."

"6. The record in causes of admiralty and maritime jurisdiction, where under the requirements of law, the facts have been found in the Court below, and our power to review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to the proper review of the case."

In the "Annie Lindsley" (104 U. S., 185), the Supreme Court said: "Upon an appeal from a decree in admiralty, rendered since May 1st, 1875, when the act went into effect, we cannot look into the evidence or

the opinion of the Court to ascertain the facts. The evidence is not properly in the record, and, by amendment to rule 8, promulgated May 2d, 1881, *it is excluded from the transcript.* Where the Circuit Court has passed on all the issues, we cannot listen to complaints that it has refused to find certain facts which it was asked to find, or has found certain other facts which the weight of the testimony did not warrant. * * * The appellant has raised other points resting wholly or in part upon a denial of the truth of the facts found or upon alleged facts not found, but which he claims the evidence establishes. It is, therefore, not necessary to consider them. Our duty is to decide whether the findings actually made by the Court support its conclusions of law and the decree, and there our duty ends."

In the case of the "Francis Wright," 105 U. S., 381, the transcript as sent up contained all the testimony used on the trial below. The Court said, page 389: "There is another equally fatal objection to this bill of exceptions. An evident effort has been made here, as it has been before, to so frame the exception as, if possible, to secure a reexamination of the facts in this Court. The transcript which has been sent up contains the pleadings and all the testimony used on the trial below. The bill of exceptions set forth that at the trial the pleadings were read by the respective parties and the testimony then put in on both sides. This being done, the libellants presented to the Court certain requests for findings of fact and of law * * * It is then stated that the Court made its findings of fact and of law and filed them with the Clerk, together with the opinion in writing of the Circuit Justice who heard the cause. The libellants then filed what are termed exceptions to the findings and the refusals to find * * * We have no hesitation in saying this is not a proper way of preparing a bill of exceptions to present to this Court for review rulings of the Circuit

Court such as are now complained of. A bill of exceptions must be 'prepared as in actions at law,' where it is used, 'not to draw the whole matter into examination again,' but only distinct points and those of law."

Merchants' Insurance Co. vs. Allen, 121 U. S., 67: A bill of exceptions was prepared containing the entire evidence in the cause which was signed by the Circuit Judge, with the remark that "this bill is claimed by the respondent under the authority of the 'Francis Wright,' considering which case the Court does not feel at liberty to deny the bill" (see p. 71).

The Court (p. 71) quotes from the opinion in the case of the "Francis Wright" as follows: "Questions depending on the weight of evidence are, under the law as it now stands, to be conclusively settled below; and the fact in respect to which such an exception may be taken must be one of the material and ultimate facts on which the correct determination of the cause depends;" and continues (p. 72): "The apparent purpose of counsel in preparing the bills of exceptions was to have the whole case retried here on all the evidence. That this cannot be done, since the Act of 1875, has long been settled."

GEO. A. BLACK,
Proctor for Libellants.